

MICHAEL SLAYTON
Claimant

SE KANSAS REGIONAL EDUCATION CENTER
Respondent

**KANSAS ASSOCIATION OF SCHOOL BOARDS
WC FUND, INC.**
Insurance Carrier

The ALJ found in the December 4, 2013, Order that claimant's accident, on March 25, 2013, was competent to cause the medial collateral sprain and an acute contusion, but was not competent or the prevailing factor for the osteoarthritis in claimant's right knee. The ALJ denied claimant's request for treatment with Dr. James Brady, D.C.

Medical expenses incurred at Topeka Pathology in the amount of \$55 were ordered paid and \$351.43 in unauthorized medical was ordered reimbursed to claimant's counsel.

On December 5, 2013, claimant filed a Motion for an Order Nunc Pro Tunc, stating the ALJ failed to rule on the following issues that were presented for determination:

1. Payment of the outstanding, authorized medical bill from Kansas Orthopedics & Sports Medicine, marked as an exhibit; and
2. Request for treatment of claimant's right hip and back injury.

Respondent responded to the motion arguing claimant never complained of or requested treatment for a low back injury, therefore those requests should be denied.

The ALJ responded to claimant's motion on December 16, 2013, stating claimant's motion for a Nunc Pro Tunc order was denied, commenting that claimant's motion read more like an appeal or a request for reconsideration. The request for payment of the bill from Kansas Orthopedics & Sports Medicine was denied and the ALJ held the work accident was not the prevailing factor for the back and hip complaints. Respondent's request to exclude medical evidence concerning the back and hip was denied as respondent did not object to the medical evidence at the preliminary hearing.

Claimant filed an application for review of the December 4, 2013, Order on December 17, 2013, and filed an application for review of the December 16, 2013, Order on December 19, 2013. Claimant argues the ALJ erroneously rejected substantial competent and uncontroverted evidence that he developed a back and right hip injury as a natural and probable consequence of his compensable and uncontested work-related right knee injury. Claimant also argues the ALJ erred in not finding he is in need of ongoing treatment for his knee injury. Finally, claimant argues the ALJ erred in denying payment of the bill from Kansas Orthopedics & Sports Medicine as authorized. Claimant requests an Order finding compensable injuries to the right knee, hip and back and to direct respondent to provide an authorized medical evaluation and, if necessary, treatment for the right knee, right hip and back injuries as recommended by Dr. Gilbert and Dr. Brady.

Respondent argues additional treatment for claimant's right knee should be denied because the prevailing factor in his ongoing right knee symptoms is his preexisting osteoarthritis. Respondent further argues claimant failed to meet his burden of proving his workplace accident was the prevailing factor in causing his alleged injury to his low back and right hip. Therefore, respondent contends the Order should be affirmed.

The issues raised by claimant on appeal are:

1. Whether claimant's work was the prevailing factor in causing claimant's current knee pain and need for treatment in the right knee;

2. Whether claimant's work was the prevailing factor in causing claimant's low back and right hip pain;

3. Whether the ALJ erred in denying payment of the bill from Kansas Orthopedics & Sports Medicine as authorized?

FINDINGS OF FACT

Claimant came to preliminary hearing to request authorized medical treatment for his right knee, right hip and back. Claimant was also seeking payment for medical expenses with Topeka Pathology and Dr. Brady at Advantage Medical.

Claimant testified that as of March 2013 he'd worked for Southeast Kansas Educational Service Center, off and on, for 20 years. Claimant is responsible for the physical education of the grade school, middle school and high school students. Claimant has an annual contract with respondent and is paid approximately \$32,000.

On March 25, 2013, claimant suffered an injury to his right knee after losing his balance, falling and sliding 5-6 feet into a wall. His right knee and right shoulder slammed into the wall. He immediately felt pain in his right knee, couldn't bear weight on his knee and had pain in his ribs. He also had pain in his shoulder, but his knee hurt the most and demanded most of his attention. Claimant reported the accident that day to respondent's administrative assistant, Cheryl Teel. The accident had been captured on video, but the video was not preserved.

Claimant was sent to Minor Med of Topeka for treatment. X-rays of his knee were taken and claimant was told to go back to work and return if he didn't improve. Over the next couple of weeks claimant continued to have instability and pain above and on the left side of his right knee, and he had swelling in the knee. Claimant returned to Minor Med and an MRI of the knee was ordered. The MRI displayed a possible abnormal signal involving the medial collateral ligament. Claimant was then sent to board certified orthopedic surgeon John H. Gilbert, M.D., at Kansas Orthopedics & Sports Medicine. Dr. Gilbert examined claimant on April 30, 2013. He also attempted to review the MRI, but was unable to. He did read the radiology report. Dr. Gilbert diagnosed claimant with osteoarthritis in the right knee, with an acute knee contusion and medial collateral sprain. Nonsteroidal anti-inflammatories and a corticosteroid injection were prescribed.

Claimant met with Dr. Gilbert several times and had his knee aspirated three or four times. A series of Euflexxa injections was recommended, a surgical consult was ordered and claimant was given a brace. Claimant never had the surgical consult as it was denied by respondent's insurance company.

Claimant met with Dr. Gilbert as the authorized treating physician, for followup on May 17, 2013. Claimant continued to have pain with weight bearing as well as post

exertionally and at night. Dr. Gilbert recommended an empiric injection of the right knee with a mixture of Xylocaine and Kenalog to sort out how much of claimant's persistent complaints were from the medial collateral. Claimant was allowed to continue with his full duties and instructed to return in two weeks. When claimant returned on May 31, 2013, he reported pretty good relief from the injection, until he tried to play basketball, when, as he came down from a rebound, he experienced severe pain in the knee which persisted.

Claimant returned to Dr. Gilbert on July 1, 2013, still experiencing pain with weight bearing. Fluid therapy versus arthroscopy was recommended with claimant choosing the injections. Fluid was drained off the knee and 2 cc of Euflexxa was injected. Claimant returned on July 8, 2013, for a second injection. A third injection was administered on July 15, with claimant reporting popping and pain in the knee. A probable surgical consult was discussed. Dr. Gilbert opined claimant had osteoarthritis in the right knee with a medial collateral sprain. On July 26, 2013, claimant was fitted with a road runner brace to the right knee.

In a letter of July 30, 2013, to Pam Crossland, an employee of respondent's insurance company, Dr. Gilbert explained claimant's past and current condition, diagnosing the medial collateral sprain as well as the preexisting osteoarthritis in the right knee. The doctor opined the prevailing factor in claimant's ongoing symptoms is the osteoarthritis.

At the August 16, 2013, examination, claimant reported the knee was substantially improved. Dr. Gilbert reported that any followup in September would be due to the osteoarthritis and not the medial collateral sprain. In his letter of August 26, 2013, Dr. Gilbert noted the symptoms from the medial collateral sprain had largely resolved. Dr. Gilbert's several months of medical reports contain no mention of either claimant's back or hip. Dr. Gilbert, in his report of September 13, 2013, recommended a surgical consultation to check for remediable problems within the knee despite the negative MRI.

At the request of his attorney, claimant met with James T. Brady, D.C., for an examination on October 30, 2013. By the time claimant met with Dr. Brady, he no longer had the same symptoms. Claimant came in wearing a knee brace on the right leg and had complaints of constant right knee pain; limited range of motion of right knee; weakness of right knee and calf and constant low back pain, bilaterally, as low as 4 to 6 out of 10 and increasing with activity.

Dr. Brady noted that claimant ambulated in a restricted and guarded manner, putting most of his weight on the left leg when he walked, due to pain in the right knee. Claimant had increased tenderness and swelling of the medial collateral ligament on the right knee and pain with straightening and bending the knee. Claimant also had tenderness on motion with palpation at L4-L5 and L5-S1. Heat was also noted on palpation at L4-L5 and L5-S1, with increased swelling at L4-L5 and L5-S1 on right. Lumbar flexion was limited to 4 inches from the floor due to pain, lateral bends were restricted at 15 inches from the left and 16 inches from the right. Dr. Brady noted that since claimant had been limping around

on the right knee, his low back pain had increased. Cervical range of motion was full, and Dr. Brady noted claimant had pain with increased sitting, walking, work, standing, sleeping, sports and his daily activities.

Dr. Brady felt it was necessary to obtain x-rays to rule out possible fracture, gross osseous pathology or severe dislocation of the lower back. He also reviewed claimant's x-rays and MRI from April 4, 2013.

Claimant testified the instability and pain in his right knee were constant. Driving and sleeping had become difficult because his knee would lock up and he had pain in his right hip and right lower back. He no longer had pain in his right shoulder or ribs at the time he met with Dr. Brady.

Claimant attributes the pain in his hip and low back to his altered gait. He testified he has been limping since the accident. He also testified that Dr. Brady indicated to him that the right hip and low back pain was directly related to the fall. Claimant testified that Dr. Brady conducted a thorough exam that lasted about an hour and a half. Dr. Brady recommended physical and chiropractic therapy, and to continue with light duty work and wearing the knee brace. Claimant testified that the most time he spent with Dr. Gilbert was two to three minutes. Claimant testified he would like to try the conservative care recommended by Dr. Brady.

Claimant denied any prior knee swelling or pain and had not been told of any arthritis in his knee until he got to look at the MRI report that mentioned minimal to mild arthritis. Claimant testified he had been in the best shape of his life before the accident and had lost some weight. Since the accident he has regained 20 pounds because he has been unable to work out like he had before the accident.

Dr. Brady opined that claimant, as a result of the accident, suffered an acute moderate post traumatic sprain/strain of the medial collateral ligament of the right knee attended by weakness of the right calf complicated by sprain/strain of the lumbar spine associated with edema and swelling of the joint capsule of the right knee. Dr. Brady recommended chiropractic care with physical therapy to include manipulations of the right knee and the lumbar spine, three times a week for four weeks. He recommended claimant continue with the knee brace, but planned to wean him off it to avoid further weakening the knee.

Dr. Brady restricted claimant to light duty. Claimant was to avoid running or physically bending or sports that could reinjure the knee. He felt claimant needed to be at 50 percent before he could increase his physical activity. He opined that the prevailing factor which caused claimant's injuries and resultant disability and/or impairment is the March 25, 2013, fall at work.

Dr. Brady found the March 25, 2013, injury was the prevailing factor for claimant's medial collateral sprain and acute knee contusion. He found evidence of degenerative joint disease in the lumbar spine, which he felt preexisted the March 25, 2013, injury and may result in ongoing symptoms for an indefinite period, but is not the result of the March 25, 2013, injury. In reviewing the x-rays performed at his instruction, Dr. Brady, in his October 30, 2013, report, determined claimant had a mild thinning of the medial meniscus, not consistent with what would be considered degenerative or osteoarthritis.

PRINCIPLES OF LAW AND ANALYSIS

This matter went to preliminary hearing on December 4, 2013, with claimant seeking medical treatment for his right knee, right hip and back. Payment for both authorized and unauthorized medical treatment was also requested. In the original Order of December 4, 2013, the ALJ found the medial collateral sprain and acute knee contusion compensable. However, the osteoarthritis was determined to be a preexisting condition, rendered symptomatic by the accident. The original Order denied medical treatment based upon the recommendation of Dr. Brady. Claimant then requested an Order Nunc Pro Tunc to address issues not determined by the ALJ, including payment of medical bills from Kansas Orthopedics & Sports Medicine, and treatment for claimant's right hip and back.

The ALJ, in a subsequent Order dated December 16, 2013, issued without benefit of another hearing, denied treatment for the hip and back complaints and refused to authorize the contested medical bills from Kansas Orthopedics & Sports Medicine. The Order denied claimant's request for a Nunc Pro Tunc Order, finding that procedure to be inappropriate at that time. The ALJ went on to explain that the original order was that the only injury caused by the work accident was the medial collateral strain and acute knee contusion. The work accident was not the prevailing factor for the back and hip complaints. The ALJ also explained the Kansas Orthopedics & Sports Medicine bill was unclear as to what amount was for the medial collateral strain and acute knee contusion versus the osteoarthritis. Due to this lack of clarity, the ALJ was unwilling to find the bill constituted authorized medical treatment.

This Board Member notes the purpose of an order Nunc Pro Tunc is to provide a means for entering the actual judgment of the trial court which, for one reason or another, was not rendered, to supply a judicial omission, or to show what the court should have decided as distinguished from what it actually did decide.¹ Overall, the court is under the duty to make its judgment reflect its intent. If a correction entails a new finding, it is prohibited.²

¹ *Book v. Everitt Lumber Co., Inc.*, 218 Kan. 121, 542 P.2d 669 (1975).

² *Norcross v. Pickrell Drilling Co.*, 202 Kan. 524, 449 P.2d 569 (1969).

The Order of December 16, 2013, addresses claimant's hip and back complaints, and the Kansas Orthopedics & Sports Medicine bill, items not addressed in the original Order. These constitute new findings. In that regard the ALJ was correct that a *Nunc Pro Tunc* was not appropriate. Additionally, the Board has held in the past, and continues to hold, the ALJ retains jurisdiction over the parties and the issues presented at the initial preliminary hearing. This interpretation of the Act affords the parties expeditious hearings and avoids cumbersome procedures that would only serve to delay a prompt decision.³ Thus, the second Order issued by the ALJ was also appropriate.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an injury by accident?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁴

From the Order of December 4, 2013, the denial of medical benefits with Dr. Brady is not an issue over which the Board takes jurisdiction from an appeal of a preliminary hearing Order. From the Order of December 16, 2013, the denial of authorization of the Kansas Orthopedics & Sports Medicine bill is, likewise, not an issue over which the Board takes jurisdiction from an appeal of a preliminary hearing Order. Claimant's appeal of those issues is dismissed.

K.S.A. 2012 Supp. 44-501b(a)(b)(c) states:

- (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
- (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable

³ *Blue v. LSC*, No. 236,567, 1999 WL 123259 (Kan. WCAB Feb. 5, 1999).

⁴ K.S.A. 2012 Supp. 44-534a(a)(2).

to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f)(1)(2)(B) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2012 Supp. 44-508(f)(3)(A) states:

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

- (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2012 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

With regard to the issues dealing with the denial of medical treatment for both the osteoarthritis in claimant's right knee and the hip and back complaints, the Board does take jurisdiction. Those issues deal with whether claimant suffered injury by accident which arose out of and in the course of his employment with respondent, and whether there is a causal connection between the current need for medical treatment for those conditions and the work accident on March 25, 2013.

The ALJ found the opinion of Dr. Gilbert to be the most persuasive in this matter. First, Dr. Gilbert was the authorized treating physician in this matter. He had the opportunity to observe and treat claimant on several occasions and to determine not only the extent of claimant's injuries, but also to evaluate the cause of those injuries. Second, Dr. Gilbert is a board certified orthopedic surgeon, trained specifically to treat bone and joint injuries. Finally, Dr. Gilbert examined and treated claimant not long after the accident in this matter. Dr. Brady examined claimant on only one occasion, is not an orthopedic surgeon and did not see claimant until seven months after the accident occurred. The finding that Dr. Gilbert's opinion is the most credible is supported by this record and is adopted by this Board Member.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Orders should be affirmed. Claimant has failed to prove his accident is the prevailing factor with both his right knee osteoarthritis and his hip and low back complaints. Claimant's request for payment of the medical bills from the Kansas

⁵ K.S.A. 2012 Supp. 44-534a.

Orthopedics & Sports Medicine and the requested authorization of Dr. Brady are not issues over which the Board takes jurisdiction on appeal from a preliminary hearing Order. The appeal of those issues is dismissed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated December 4, 2013, is affirmed, and the Order dated December 16, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2014.

HONORABLE GARY M. KORTE
BOARD MEMBER

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